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No. 93-263

In The

Supreme Court of the United States

October Term, 1993

MATT T. KOKKONEN,

Petitioner,

vs.

GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, et al.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTION PRESENTED FOR REVIEW

This case raises the unremarkable question whether the federal District Court has subject matter jurisdiction to enforce a settlement agreement: (1) entered into on the record with the active participation of the District Court; (2) entered into at trial after the parties had rested and closing arguments had been completed; (3) memorialized by the transcript of proceedings in chambers before the District Court; (4) where the District Court clearly anticipated that any issues involving the enforcement of the agreement would be brought before it; and (5) where the District Court found that the party petitioning for certiorari has in bad faith refused to comply with the terms of the agreement.

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I.

REFERENCE TO PRIOR DECISIONS IN THIS CASE

The United States District Court for the Eastern District of California issued its Order Enforcing Settlement Agreement on August 20, 1992. A copy of that Order is attached hereto as Appendix A. The United States Court of Appeals for the Ninth Circuit entered its unpublished Memorandum Opinion affirming the District Court's Order on May 18, 1993. A copy of that Memorandum Opinion is attached to the Petition for Writ of Certiorari as Appendix A.[1]

II.

STATEMENT OF THE CASE

A. Procedural History

In April 1991, petitioner Matt Kokkonen ("Kokkonen") filed a complaint against The Guardian Life Insurance Company of America ("The Guardian") and related subsidiaries, alleging a variety of claims arising out of the termination of his agent's contract and general agency contract.[2] The Guardian filed a timely Notice of

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[1] The copy of the Memorandum Opinion attached to Petitioner's brief as Appendix A contains a typographical error in a footnote at page A-6. The panel found the case *suitable* for decision without oral argument. Petitioner's appendix erroneously states the panel found the case *unsuitable* for decision without oral argument.

[2] The Guardian provides this detailed "Statement of the Case" pursuant to Rules 15.1 and 24.2 of the Supreme Court Rules in order to apprise this Court of facts omitted from or misstated in Kokkonen's brief.

Removal based upon diversity of citizenship jurisdiction. It asserted counterclaims against Kokkonen arising out of his wrongful conduct following the termination of his contracts.[3]

The action proceeded through a jury trial which began on March 3 and continued through March 5, 1992. After closing arguments and before the District Judge instructed the jury, Kokkonen, through his counsel, sought a settlement.

The parties formally appeared in chambers before Judge Coyle and placed their settlement agreement on the record. The transcript of the proceedings in chambers memorializes the terms of the settlement agreement and reflects the active role taken by Judge Coyle in clarifying those terms.[4] The transcript reveals that Judge Coyle anticipated that any proceeding to enforce the settlement would require an appearance before him. Thus, immediately after helping the parties resolve one particular issue, the court stated: "I don't want to see you people back here to have the agreement enforced. I don't want to see anybody fooling around, that's all I can say . . . . You all have better things to do than worry about coming back here." Appendix B, B8:10-15.

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[3] The two related subsidiaries were dismissed from the appeal to the Ninth Circuit. The Guardian is a mutual benefit company which is in effect owned by its policyholders. Neither The Guardian nor any of its affiliated companies are publicly traded. It does not have a parent corporation and all of its subsidiaries are wholly owned.

[4] Attached hereto as Appendix B is a copy of the transcript of the in-chambers proceedings.

Pursuant to the terms of the settlement arrived at in chambers, the parties executed a stipulation to dismiss the pending complaint and counterclaim. Judge Coyle executed the Stipulation and Order of Dismissal and ordered the action dismissed. Thereafter, Kokkonen failed and refused to comply with the settlement agreement he sought. The Guardian had no choice but to file a motion to enforce the settlement agreement before Judge Coyle. Judge Coyle found that Kokkonen failed to comply with the settlement agreement and entered a strongly worded Order enforcing it under the threat of contempt. *See* Appendix A.

There is no doubt that The Guardian anticipated that any proceeding to enforce the settlement would be by motion before Judge Coyle. For example, after all the details were finalized on the record before Judge Coyle, The Guardian's counsel made sure that the terms of the settlement were clear to the court. Thus, counsel inquired: "Judge, do you understand the agreement? I just wanted to have one party not involved in this making sure that the judge understood the agreement." Judge Coyle responded: "Oh, I understand." Appendix B, B11:22-26. The Guardian and its counsel plainly anticipated that Judge Coyle would be the United States District Judge who would hear and rule upon any motion to enforce the settlement placed on the record with his active participation and assistance.

Indeed, in its ruling on the motion to enforce the settlement, the court noted its own recollection of the proceedings in chambers. Judge Coyle recognized that Kokkonen had "expressed no concern as to the certainty of the agreement at the time," and he had "no trouble

recollecting that Kokkonen was to turn over *all* Guardian files in his possession. This recollection [of the Court] is substantiated by the above quoted portion of the transcript." Appendix A, A7:5-13.

B. The Substance of the Case and the Settlement

Kokkonen's First Amended Complaint set forth claims for: (1) wrongful termination; (2) breach of fiduciary duty and failure to account; (3) interference with prospective business advantage; (4) fraud; (5) breach of lease; and (6) wrongful denial of existence of lease. The Guardian's counterclaim set forth claims for: (1) conversion of The Guardian's files; and (2) unfair competition.

In summary, the terms of the settlement were: (a) mutual dismissals with prejudice; (b) Kokkonen will not give his "clients" form requests to send to The Guardian, but may advise them in good faith of requests for information those "clients" should make to The Guardian; (c) Kokkonen will turn over to The Guardian all Guardian files or files containing information regarding Guardian policyholders (although he may retain copies thereof) by March 31, 1992; and (d) Kokkonen will pay ten dollars to The Guardian.

C. The Order Enforcing Settlement Agreement

The District Court's Order Enforcing Settlement Agreement objectively recites Kokkonen's bad faith conduct in refusing to comply with the terms of the settlement agreement. The District Court found all of Kokkonen's arguments in opposition to the motion to

enforce settlement "seriously wanting." The court further stated:

> The court finds that Mr. Kokkonen has been stubbornly and unjustifiably uncooperative in refusing to comply with the terms of the settlement agreement. Mr. Kokkonen has, in fact, blatantly breached the terms of the settlement agreement by writing to The Guardian on behalf of a policyholder as well as withholding files that he agreed to return. The court will not tolerate such behavior.

Appendix A, A7:26-A8:20. Thus, the District Court ordered Kokkonen to turn over all pertinent files, to cease writing to The Guardian on behalf of policyholders, and to pay The Guardian its fees and costs incurred in bringing the motion.

Kokkonen did not appeal in any way from the substance of the court's Order Enforcing Settlement Agreement. He had no basis for appealing from the court's findings that he acted in bad faith and that he "blatantly breached" the terms of the settlement agreement. Instead, he argued to the Ninth Circuit that the District Court lacked jurisdiction to enforce the terms of the settlement agreement reached in chambers. Although Kokkonen was the party to seek the settlement in the first place, and although the judge before whom the motion to enforce was pending had participated in bringing about the settlement agreement, Kokkonen argued that The Guardian should be required to file a new lawsuit in order to obtain his compliance with the agreement.

The Ninth Circuit rejected Kokkonen's arguments and affirmed the Order Enforcing Settlement Agreement.

Kokkonen now seeks this honorable Court's intervention in yet another attempt to escape compliance with the settlement agreement he sought and entered into in order to avoid a jury verdict.

III.

SUMMARY OF ARGUMENT

In *Wilkinson v. FBI*, 922 F.2d 555 (9th Cir. 1991), the Ninth Circuit held that a District Court has the jurisdiction to decide post-dismissal motions to enforce settlement agreements pursuant to its inherent supervisory powers. Kokkonen argues that *Wilkinson* and the Ninth Circuit's ruling in this case conflict with authority from other Circuit Courts which require that the settlement agreement be incorporated and approved in the order of dismissal, that the court expressly or impliedly retain jurisdiction, or that an independent basis of jurisdiction must exist. Regardless of any perceived conflict, this is not the appropriate case for addressing the issue for several reasons.

Kokkonen has intentionally and in bad faith refused to comply with the settlement agreement. His conduct in this case demonstrates his disregard for the settlement process and for his obligation to act in accordance with his agreement. He should not be permitted to benefit from any action by this Court which would further delay fulfillment of his legal obligations. Moreover, the transcript of the in-chambers proceedings, which proceedings resulted in the settlement in this matter, indicates that the District Judge plainly anticipated that he would entertain any post-dismissal motions regarding the settlement

agreement. Thus, even those Circuits which require the District Court to retain jurisdiction would likely find that the Order Enforcing Settlement Agreement was properly affirmed.

Kokkonen approached The Guardian to settle this case after closing arguments in a three-day jury trial. The District Judge actively participated in the settlement process in a proceeding in chambers. With the court's assistance, a settlement was concluded and placed on the record. The transcript of that proceeding is the memorialization of the settlement agreement. None of these compelling facts are present in any of the authority Kokkonen contends conflicts with the Ninth Circuit.

Given the strong public policy in favor of settlement of litigation, and given the extreme circumstances of this case, the District Court was undoubtedly correct to require Kokkonen to comply with the terms of the agreement under the threat of contempt. For the same reasons, this case should not be the vehicle for addressing any perceived conflict in federal law. The interests of justice require that Kokkonen's attempts to avoid living up to his bargain be put to an end.

IV.

A WRIT OF CERTIORARI SHOULD NOT ISSUE

A. Kokkonen's Bad Faith Conduct Should Not Be Sanctioned By This Court

The District Judge found that Kokkonen has steadfastly and in bad faith refused to comply with the settlement agreement he sought. Based on Kokkonen's

unjustifiable behavior, Judge Coyle ordered Kokkonen to comply with the agreement under the threat of contempt. Appendix A, A8:14-18. Judge Coyle found no basis for Kokkonen's refusal to comply and described Kokkonen's opposition to The Guardian's motion to enforce the agreement as "seriously wanting," "ridiculous" and "barely deserv[ing] of mention." *Id.* at A6:14-15, A7:1-2, A7:17-18. The Ninth Circuit affirmed. Issuing a writ of certiorari in this case would give this Court's imprimatur to Kokkonen's behavior. The Guardian respectfully submits that the Petition for Writ of Certiorari should be denied on this ground alone.

B. The Case Before This Court Is Not An Appropriate Vehicle For Resolving Any Perceived Split Among The Circuit Courts of Appeals

Kokkonen argues that his petition should be granted to resolve a split in authority among the Circuit Courts of Appeals concerning the jurisdiction of the District Court to enforce the terms of a settlement agreement after the underlying action has been dismissed pursuant to the agreement. Kokkonen contrasts authority in the Ninth Circuit with authority from several other jurisdictions. Without mention of the factual differences between this case and those he contends are in conflict, he urges this Court to intervene. Even if this Court were to agree that an important conflict among the Circuit Courts exists, this case is not the appropriate vehicle for addressing a split.

The District Court would likely have subject matter jurisdiction over The Guardian's Motion to Enforce Settlement Agreement even in some of those Circuits which purportedly conflict with the Ninth Circuit. Moreover, this case arises out of a unique factual setting which is notably absent from nearly all of the appellate opinions from Circuits other than the Ninth Circuit. The strong public policy favoring the settlement of litigation warrants a finding of jurisdiction under the circumstances of this case.

1. The District Court Anticipated That It Would Entertain Any Motions Regarding The Settlement Agreement.

Several of the cases cited by Kokkonen as demonstrating the purported split in authority agree that a District Court has jurisdiction to enforce the terms of a settlement agreement where the Court expressly or impliedly retained jurisdiction to do so. *See, e.g., United Steelworkers of America v. Libby, McNeil & Libby, Inc.*, 895 F.2d 421, 423 (7th Cir. 1990); *Hinsdale v. Farmers National Bank & Trust Co.*, 823 F.2d 993, 995 n.1 (6th Cir. 1987); *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir. 1985). The District Court here clearly anticipated that it would hear and resolve any issues that may arise concerning the settlement agreement. Thus, any split in authority is not meaningful in this case.

In *McCall-Bey*, a prisoner brought a civil rights action against several corrections officers. Four years later, the parties entered into a settlement agreement and executed a stipulation of dismissal. The judge then ordered the

action dismissed. Although the judge was aware that settlement negotiations were in progress, he did not participate in the negotiations. Two months after the lawsuit was ordered dismissed, the plaintiff sent a letter to the court complaining of certain actions taken by the defendant purportedly in derogation of the settlement. The court treated the letter as a petition to enforce the settlement agreement and granted the petition. *McCall-Bey*, 777 F.2d at 1182.

On appeal, the Seventh Circuit held that the District Court had subject matter jurisdiction after the dismissal to effectuate the terms of the settlement agreement because it impliedly retained jurisdiction for that purpose. *McCall-Bey*, 777 F.2d at 1188. The court stated that retention of jurisdiction need not be expressed in any particular form:

> All that is necessary [to retain jurisdiction] is that it be possible to infer that [the judge] did intend to retain jurisdiction – that he did not dismiss the case outright, thereby relinquishing jurisdiction. Of course the more explicit the district judge is about retaining jurisdiction the less room there is for a dispute, as in this case, over whether he did so. [Citation.]

Id.

In *McCall-Bey*, the order of dismissal referred to the stipulation of dismissal; the stipulation stated that dismissal was pursuant to the settlement agreement; and the settlement agreement contained a clause that the appellate court interpreted as requesting the district court to retain jurisdiction to enforce the settlement. *McCall-Bey*,

777 F.2d at 1188-89. Nonetheless, the impact of the dismissal in determining whether the judge intended to retain jurisdiction was unclear because neither the stipulation nor the settlement agreement were before the judge at the time he ordered dismissal. The court therefore considered, *inter alia*, that the judge must have been kept apprised of the settlement negotiations over time and thus knew that the parties agreed to the retention of jurisdiction by the District Court. It also considered that the judge would not have treated plaintiff's letter as a petition to enforce the settlement agreement and then granted the petition had he intended an outright dismissal of the case. *Id.* at 1189. Accordingly, the Seventh Circuit found that court must have intended to retain jurisdiction. *Id.*

In the case before this Court, there is stronger indicia than in *McCall-Bey* that the District Judge did not intend an outright dismissal such that he would not have the power to hear any post-dismissal motions regarding the settlement agreement. During the in-chambers proceedings held to place the settlement on the record, the District Court stated: "I'm just trying to get [the terms of the agreement] straight, and it makes sense and that you can all live with [it so] *I don't see you all back here in the future.*" *Id.* at B5:12-14 [emphasis added].

After repeated resistance by Kokkonen to acknowledge the agreed upon terms, Judge Coyle voiced his concern that Kokkonen comply with the agreement. He stated: "*I don't want to see you people come back here to have the agreement enforced.* I don't want to see anybody fooling around, that's all I can say. . . . You all have better things to do than worry about coming back here." *Id.* at B8:10-15

[emphasis added]. These statements by the court lead to the inescapable conclusion that the court anticipated it would hear post-dismissal motions to enforce the settlement agreement. The only plausible conclusion is that the court impliedly, if not explicitly, retained jurisdiction for that purpose.

In *United Steelworkers*, also cited by Kokkonen, the Seventh Circuit reaffirmed its holding in *McCall-Bey* that a District Court has subject matter jurisdiction to enforce the terms of a settlement agreement after the case has been dismissed where it expressly or impliedly retained jurisdiction for that purpose. *United Steelworkers*, 895 F.2d at 423. *United Steelworkers* involved an alleged breach of a collective bargaining agreement. The parties agreed to a settlement (without the District Court's participation) and the case was thereafter dismissed. Two years later, the union moved the District Court for clarification of the terms of the settlement agreement. There being nothing in the record from which to imply that the court retained jurisdiction, the Circuit Court ultimately held that the District Court did not have jurisdiction to grant the relief sought. *Id.* at 423-4.

In *Hinsdale*, the Sixth Circuit agreed with the Seventh Circuit's holding in *McCall-Bey* that a District Court may retain jurisdiction to enforce the terms of a settlement agreement. *Hinsdale*, 823 F.2d at 995 n.6. However, unlike the case before this Court and unlike *McCall-Bey*, there was no indication in *Hinsdale* that the District Court expressly or impliedly retained jurisdiction to entertain post-dismissal motions regarding the settlement agreement. *Id.* at 995. There being no retention of jurisdiction, the court decided the question of jurisdiction on the basis

of a District Court's inherent supervisory powers to specifically enforce the terms of a settlement agreement. *Id.* at 995-96.

The facts of this case reveal that even the Sixth and Seventh Circuits would find that the District Court had jurisdiction to decide The Guardian's motion to enforce settlement. Judge Coyle's statements revealing a retention of jurisdiction and his strong rejection of Kokkonen's arguments cannot be easily ignored. Judge Coyle made clear to the parties that any failure to comply with the terms of the settlement would be brought before him and would not go unpunished. Accordingly, The Guardian respectfully submits that any perceived split in Circuit Court opinions on a District Court's power to hear post-dismissal motions to enforce settlement agreements is not meaningful in the context of this case.

2. The Cases Cited by Kokkonen in the Fourth, Sixth and Seventh Circuits Are Distinguishable.

There are other important factual differences between this case and the authority Kokkonen argues is in conflict with the Ninth Circuit. *None* of the purportedly conflicting opinions involves a case which has proceeded through the closing arguments of a trial, where a settlement agreement is put on the record with the District Court's active participation and assistance, where the transcript is the written memorialization of the settlement, and where the District Court plainly contemplated it would enforce the settlement. The presence of these facts makes this case a particularly inappropriate one for resolving any perceived conflict among the Circuits.

Further, in two of the principal cases relied upon by Kokkonen to demonstrate a split in authority, the courts were greatly influenced by the fact that the settlement agreements were the result of private negotiations between the parties. Indeed, in stating the issue for review in *United Steelworkers*, the Seventh Circuit expressly pointed out that it was determining the jurisdiction of the District Court to decide post-dismissal motions regarding settlement agreements "independently negotiated and arrived at by the parties." *United Steelworkers*, 895 F.2d at 422. In discussing whether the District Court had retained jurisdiction to hear the post-dismissal motion, the court relied, *inter alia*, on the fact that the judge "merely approved and signed the parties' settlement agreement pursuant to their request." *Id.* at 423.

In *Fairfax Countywide Citizens Ass'n v. Fairfax County, Va.*, 571 F.2d 1299, 1303 (4th Cir.), *cert. denied*, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978), the Fourth Circuit declined to find that a District Court has inherent jurisdiction to decide a post-dismissal motion to enforce a settlement agreement. It held instead that the settlement agreement must either be approved and incorporated into an order of the court or an independent basis of jurisdiction must exist. *Fairfax* rejected the argument that considerations of fairness required the court to assume jurisdiction over the motion because it viewed the settlement agreement as nothing more than a privately negotiated contract subject to state law. *Id.* at 1303 and 1305-6.

In this case, Judge Coyle played an active role in clarifying the terms of the settlement and twice threatened to send the case to the jury when Kokkonen (who was in chambers with counsel) attempted to renegotiate

agreed upon terms. Appendix B, B5:12-6:20, B7:1-3, B7:15-22, B9:4-11:2. In the few cases where the District Judge actively participated in the settlement, the District Court's jurisdiction to entertain post-dismissal motions to enforce the settlement agreement have been upheld. Most notably, in *Wilkinson*, the parties entered into a series of discovery stipulations which comprised the settlement agreement. *Wilkinson*, 922 F.2d at 557. The stipulations called for dismissal of all claims in return for production of certain documents. Pursuant to the discovery stipulations, the parties agreed to a procedure whereby the court would review sample selections of documents and determine whether the claims of privilege were properly asserted. *Id.* Thus, the settlement agreement itself required the active participation of the District Judge.

In *Joy Manufacturing Co. v. National Mine Service Co., Inc.*, 810 F.2d 1127 (Fed. Cir. 1987), the Federal Circuit also upheld the District Court's jurisdiction to decide a post-dismissal motion to enforce settlement. The parties reached an impasse in settlement negotiations which was overcome only after a suggested compromise by the trial judge. Finally, in *Kelly v. Greer*, 365 F.2d 669, 671 (3rd Cir. 1966), *cert. denied*, 385 U.S. 1035, 87 S.Ct. 772, 17 L.Ed.2d 682 (1967), the Third Circuit held that a District Court has the "power to summarily enforce settlement agreements entered into with its approval." There the parties had lengthy settlement negotiations, and the District Court periodically assisted them. *Id.* at 670.[5]

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[5] In only one case cited by Kokkonen, a District Court judge held settlement conferences with the parties and/or their counsel. *Hinsdale*, 823 F.2d at 994. In *Hinsdale*, however, the judge

The fact that the settlement in this case was reached after closing arguments and only with the assistance of the court provides a compelling basis for the exercise of jurisdiction. Indeed, these facts distinguish this case from the cases which purportedly create a conflict among Circuit Court opinions. Having agreed to the terms of the settlement agreement, Kokkonen should not now be rewarded for his refusal to comply with the agreement by means of this petition.

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who held the settlement conferences was not the judge who was assigned to the case, ordered the dismissal or was hearing the post-dismissal motion. Moreover, the parties in *Hinsdale* agreed to dismiss the case before the settlement agreement was reduced to writing. The post-dismissal motion arose in the context of a party refusing to sign settlement documents she contended did not reflect the agreement reached.

Although *Hinsdale* agrees with the Ninth Circuit that the court has the inherent jurisdiction to enforce settlement agreements, under some circumstances it imposes the additional requirement that a party first file a Rule 60 motion to vacate the prior dismissal. *Id.* at 996. Kokkonen waited until the day The Guardian's motion to enforce was set for hearing to raise this issue. Had he raised it in a timely manner, The Guardian certainly could have moved for vacation of the Stipulation and Order of Dismissal under Rule 60(b)(6). The District Court's Order Enforcing Settlement Agreement in this case leaves no doubt that it certainly would have vacated the dismissal if that had been a requirement. This is evident from the District Court's conclusion that Kokkonen "has been stubbornly and unjustifiably uncooperative in refusing to comply with the terms of the settlement agreement," that he "blatantly breached the terms," that the "court will not tolerate such behavior," and that he should be sanctioned. Appendix A, A7:26-8:2. The Guardian did not make a motion pursuant to Rule 60 because it is not required in the Ninth Circuit.

3. Public Policy and The Interests of Justice Require That Kokkonen's Petition for Writ of Certiorari Be Denied.

Settlement agreements are highly favored and will be enforced whenever possible. *See, e.g., Williams v. First National Bank of Pauls Valley*, 216 U.S. 582, 595, 30 S.Ct. 441, 445, 54 L.Ed. 625 (1910); *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 176 (5th Cir. 1975), *cert. denied sub. nom. Skydell v. Ecological Science Corp.*, 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762 (1976). "[T]here is an overriding public interest in settling and quieting litigation." *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977); *Marek v. Chesny*, 473 U.S. 1, 10, 105 S.Ct. 3012, 3017, 87 L.Ed.2d 1 (1985).

Consistent with the strong public policy favoring the settlement of litigation, the Ninth Circuit held in *Wilkinson* that "district courts have the inherent power to enforce settlement agreements." *Wilkinson*, 922 F.2d at 557. The District Court in this case relied on *Wilkinson* in stating "there is no doubt that [this Court] has jurisdiction to enforce the settlement agreement." Appendix A, A5:17-19. Judge Coyle very appropriately cited the language of *Wilkinson* and *Dacanay v. Mendoza*, 573 F.2d 1075 (9th Cir. 1978), in concluding that the foundation of the trial court's power is "the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time-consuming litigation." Appendix A, A6:18-28.

The case at bar shows starkly the wisdom of these Ninth Circuit rulings. It would be a miscarriage of justice for this Court to provide Kokkonen with yet another

opportunity to avoid his legal obligations. The settlement occurred after two years of litigation, after three days of trial, and immediately before the Judge instructed the jury. The terms of the settlement very clearly show that Kokkonen received nothing with respect to his claims, while he agreed to return files to The Guardian, to refrain from writing to The Guardian on behalf of his "clients," and to pay ten dollars to The Guardian. Having plainly "lost" under the terms of the settlement agreement in the District Court and in the Ninth Circuit Court of Appeals, Kokkonen should not be permitted to force The Guardian to sue him in an independent state court action to obtain the fruits of the settlement reached before Judge Coyle.

Granting the petition would be particularly unjust in this case. Kokkonen agreed to a settlement with the prospect of an unfavorable jury verdict immediately before him. The District Judge played an active role in clarifying the settlement. With the District Court having heard three days of testimony and closing argument, having supervised the clarification of settlement terms, and having found that Kokkonen acted in bad faith, the interests of justice compel the conclusion that Kokkonen should not be provided with yet another avenue for escape. Denying this petition will bring an end to Kokkonen's gamesmanship and will bring about a result consistent with the strong public policy favoring settlements, with the goal of judicial efficiency and economy, and with the tradition of limiting federal courts' jurisdiction to actions presenting a federal interest. There can be no greater federal interest than upholding the integrity of the federal courts by forcing litigants like Kokkonen to abide by the terms of

agreements achieved with the active participation of the District Court.

V.

CONCLUSION

For the foregoing reasons, The Guardian respectfully submits that this case does not present an appropriate vehicle for addressing any perceived conflict in Circuit Court opinions. The particular factual setting of this litigation renders any conflict meaningless. Accordingly, The Guardian respectfully requests that Kokkonen's Petition for Writ of Certiorari be denied.

DATED: September 17, 1993

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MATT KOKKONEN Plaintiff, v. THE GUARDIAN LIFE INSURANCE CO. OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORP., THE GUARDIAN INVESTOR SERVICES CORP. Defendants.	No. CV-F-90-325-REC ORDER ENFORCING SETTLEMENT AGREEMENT

On June 29, 1992, the court heard The Guardian's motion to enforce the settlement agreement. Upon due consideration of the written and oral arguments of the parties, the court now enters its order as set forth herein.

I. Background

This case settled just before the jury was instructed. The terms of the settlement were stated for the record as follows:

> THE COURT: Who wishes to make the statement for the record . . . ?
>
> MR. DOLINKO: . . . [The] [c]ase is settling under the following conditions.
>
> There will be mutual dismissal with prejudice of all claims by both sides . . .

. . . .

It's further agreed that Mr. Kokkonen is not going to be sending any forms, either from himself, or be providing his quote, unquote, "clients" with any forms in order for him to request information from the Guardian. Of course, if a client of the Guardian has a request for information and puts it on their own letterhead or whatever other way they have of communicating a request for information, they're free to do so, and we will respond – the Guardian will respond to that particular quote, unquote client. Any requests for information about Guardian policyholders who are serviced out of the San Luis Obispo agency are to go to the San Luis Obispo agency. The response will go to the policyholders.

Mr. Kokkonen, to the extent he has any Guardian files or files containing information regarding Guardian policyholders, will turn over those files, but he will be allowed to copy them and retain those copies for his own records, whatever he has now.

Transcript 2:10-3:18.

The parties agreed that the files would be turned over on April 6, 1992. With regard to Kokkonen's delivery of the files on April 6th, Carl Hagmaier, an employee of The Guardian, declares,

> On April 6, 1992 at approximately 4:50 p.m. I noticed Matt Kokkonen and his secretary Lisa Hyland approaching the front entrance of The Guardian's office building . . . Ms. Hyland was carrying a cardboard box filled with files which she placed just outside the entrance of the office

> building next to another cardboard box with files which had already been placed there. As Ms. Hyland approached the entrance of the building, I saw Mr. Kokkonen approximately ten feet behind her. Mr. Kokkonen did not approach the entrance of the building . . . Ms. Hyland . . . requested that I sign a form stating Mr. Kokkonen had returned 275 files. I stated I could not sign the form until I first counted the files. Ms. Hyland then asked me if I would sign the form if it was modified to state "approximately 275 files." I said I would do so . . .
>
> Immediately after Ms. Hyland and Mr. Kokkonen left . . . I brought the two boxes into the office and examined the files. I noticed that they were all yellow-labeled files. Our office uses yellow labels on files to distinguish them as group insurance files. Upon closer examination, I noticed all the files were in connection with terminated group insurance policies and therefore are of no real value to The Guardian.
>
> I also noticed that Mr. Kokkonen had failed to return any of the individual life insurance policy files or the individual disability insurance files. It was these individual life insurance policy files and individual disability insurance files that I expected Mr. Kokkonen would return to The Guardian pursuant to the settlement reached in court.

Hagmaier Decl. 2:7-3:10.

Kokkonen has never disputed that he has the files in question. As a matter of fact, he admitted to possessing

these files in court and at his deposition.[1] He also admitted to writing a form letter to hundreds of clients in which he stated, "I am still in the business. Your client files have not been reassigned to anyone. I have them." Kokkonen admitted to possessing the files of many of the addressees of the form letters.

James Napoli, counsel for The Guardian, informed Richard Isham, Kokkonen's attorney, that Kokkonen had failed to return all files as provided by the settlement

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[1] Q: Do you have any Guardian agency files in your possession?
A: Would you explain your question a little more, please.
Q: The agency files in connection with Guardian policyholders, do you have any of those files in your possession?
A: Yes.
Q: Approximately how many?
A: That's very hard for me to say, but perhaps I can say a couple of hundred right off the top of my head.
Q: Okay, that's fair enough. Subsequent to your termination as a general agent of The Guardian, did you deny Guardian agents access to agency files . . .
A: Yes.
Q: . . . of Guardian policyholders?
A: I denied them unlimited access to client files in my agency, to my agency files.
Q: And those agency files are regarding Guardian policyholders?
A: Yes.
Mtn. 3:25-4:23.

agreement, and that he had also violated the settlement agreement by sending correspondence to The Guardian, on his letterhead and signed by him, directing The Guardian to engage in activity on behalf of a Guardian policyholder. Isham subsequently informed Napoli that he no longer represented Kokkonen. Napoli then sent a letter directly to Kokkonen to which Kokkonen did not respond. The letter stated,

> On April 6, you were to return *all* The Guardian files in your possession, including: life insurance files; disability insurance files; and group insurance files. Unfortunately, you only returned certain group insurance files and have failed to return the life insurance files and the disability insurance files . . .
>
> . . . .
>
> [Y]ou have also violated the settlement agreement by sending correspondence on your own letterhead signed by yourself directly to the San Luis Obispo office directing them to engage in activity on behalf of a Guardian policyholder. The Guardian will not tolerate any further correspondence of this nature from you.

The Guardian contends that Kokkonen has refused to return the files in bad faith and requests that the court (1) order him to return the individual policyholder files to its San Luis Obispo office; and (2) sanction him for his bad faith conduct in the amount of attorney's fees incurred in connection with this motion.[2] *Chambers v. Nasco, Inc.*, ___

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[2] James Napoli declares that his billable rate is $165.00 per hour and that he has spent ten hours preparing his motion and

U.S. ___, 111 S.Ct. 2123, 2133 (1991) (a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons).

Kokkonen filed his opposition to The Guardian's motion on the day of the hearing. Therein he (1) challenged the court's jurisdiction to enforce the settlement agreement; (2) asserted that he has complied with the settlement agreement insofar as it required him to return "agency files;" (3) challenged the agreement as being "fatally uncertain[];" (4) accused The Guardian of acting in bad faith for refusing to, in effect, renegotiate the settlement agreement; and (5) questioned the impartiality of this court.

The court has duly considered Kokkonen's arguments and finds all of them seriously wanting. First, as the court determined at oral argument, there is no doubt that it has jurisdiction to enforce the settlement agreement. As recently as last year the Ninth Circuit reaffirmed the inherent power of the district courts to enforce settlement agreements. *Wilkinson v. FBI*, 922 F.2d 555, 557 (9th Cir. 1991). *See also, The Matter of Springpark Associates*, 623 F.2d 1377, 1380 (9th Cir. 1980) ("[t]he authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time-consuming litigation"), quoting *Dacanav v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978).

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reply. Accordingly, The Guardian requests $1,650.00 plus additional fees incurred in connection with Napoli's court appearance.

Second, the assertion that the terms of the settlement are fatally uncertain is ridiculous. Kokkonen was present at the settlement negotiations and participated in an explanation of the terms of the settlement agreement on the record. He expressed no concern as to the certainty of the agreement at the time, and no uncertainty can fairly be said to exist now.

Third, the court wholeheartedly disagrees with Kokkonen's assertion the settlement agreement concerned only "agency files." The court has no trouble recollecting that Kokkonen was to turn over *all* Guardian files in his possession. This recollection is substantiated by the above-quoted portion of the transcript. Furthermore, for Kokkonen to state that he has turned over all "agency files" simply indicates that there are other files, e.g., "agent's files," which Kokkonen has not returned.

The last two elements of Kokkonen's argument barely deserve mention. Kokkonen has provided no authority for the proposition that The Guardian's refusal to re-negotiate the settlement agreement would constitute bad faith. Indeed, the court is incredulous that Kokkonen would even suggest that the agreement be re-negotiated. As for this court's impartiality, the court believes that its objectivity cannot seriously be questioned in light of the record. In any event, no motion to recuse has been filed.

The court finds that Mr. Kokkonen has been stubbornly and unjustifiably uncooperative in refusing to comply with the terms of the settlement agreement. Mr. Kokkonen has, in fact, blatantly breached the terms of the settlement agreement by writing to The Guardian on behalf of a policyholder as well withholding files that he

agreed to return. The court will not tolerate such behavior.

ACCORDINGLY, IT IS ORDERED that Mr. Kokkonen shall *immuediately* [sic] turn over *all* files of The Guardian's, whether they are known as "agent's files," "agency files" or some other name, which are in his possession or to which he has access. In accordance with the settlement agreement Mr. Kokkonen may keep only newly made *copies* of these files. IT IS FURTHER ORDERED that Mr. Kokkonen shall cease writing to The Guardian on behalf of policyholders. IT IS FURTHER ORDERED that Mr. Kokkonen shall pay The Guardian's attorney's fees incurred in connection with this motion in the amount of $1,650.00 plus travel and court appearance expenses. THE COURT HEREBY WARNS Mr. Kokkonen that if he refuses to comply with the terms of the court's order and/or the terms of the settlement agreement he may be found in contempt.

DATED: August 19, 1992

/s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge

United States District Court
for the
Eastern District of California
August 20, 1992

CERTIFICATE OF SERVICE

1:90-cv-00325

Kokkonen

v.

Guardian Life Insura [sic]

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on August 20, 1992, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Richard Basil Isham
2902 W Main Street
Suite A
Visalia, CA 93291-5731

Michael R Jencks
Jencks and Hunt
555 Chorro Street
San Luis Obispo, CA 93405-2396

James Anthony Napoli
Epstein Becker and Green
111 Pine Street
Suite 1200
San Francisco, CA 94111-5614

Jack L. Wagner, Clerk

BY: /s/ Illegible
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFONRIA [sic]

HON. ROBERT E. COYLE, JUDGE

MATT T. KOKKONEN, Plaintiff, vs. GUARDIAN LIFE INSURANCE COMPANY, Defendant.	)	JURY TRIAL NO. CV-90- 325-REC

Fresno, California
Thursday, March 5, 1992

REPORTER'S PARTIAL TRANSCRIPT

APPEARANCES:

For the Plaintiff:
RICHARD B. ISHAM
Attorney at Law
2902 West Main Street
Visalia, California 93291

For the Defendant:
EPSTEIN, BECKER & GREEN
Attorneys at Law
111 Pine Street, Ste. 1200
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94111-5614
BY: JAMES A. NAPOLI
ROBERT A. DOLINKO

Reported by: TRACI A. ROLDAN, CSR# 7566, RPR, CM

[p. 2] Thursday, March 5, 1992 Fresno, CA

(Whereupon, the following proceedings were held in chambers:)

THE COURT: Record will reflect we're in session in chambers out of the presence of the jury.

I understand the matter's been resolved and that the parties wish to put it on the record; is that correct?

MR. NAPOLI: That's correct, your Honor.

THE COURT: Who wishes to make the statement for the record resolved and go from there?

MR. DOLINKO: I will do my best to do that, your Honor. Case is settling under the following conditions.

There will be mutual dismissal with prejudice of all claims by both sides. With respect to the unfair competition claim by the Guardian against Mr. Kokkonen, it's understood that the dismissal of that claim with prejudice at this time would not in any way have any impact if Mr. Kokkonen were to engage in any form of unfair competition after today.

With respect to the payment of the court reporter, who did a wonderful job, we are going to split the per diem fee there.

It's further agreed that Mr. Kokkonen is [p. 3] not going to be sending any forms, either from himself, or be providing his quote, unquote, "clients" with any forms in order for him to request information from the Guardian. Of course, if a client of the Guardian has a request for

information and puts it on their own letterhead or whatever other way they have of communicating a request for information, they're free to do so, and we will respond – the Guardian will respond to that particular quote, unquote client. Any requests for information about Guardian policyholders who are serviced out of the San Luis Obispo agency are to go to the San Luis Obispo agency. The response will go to the policyholders.

Mr. Kokkonen, to the extent he has any Guardian files or files containing information regarding Guardian policyholders, will turn over those files, but he will be allowed to copy them and retain those copies for his own records, whatever he has now.

Mr. Kokkonen will pay the Guardian ten dollars, and I believe that's –

MR. ISHAM: We had this understanding – excuse me. We had reached an informal understanding that was not gonna be discussed or disseminated, the results of this settlement, in the community by any of the parties or members of the San Luis Obispo agency. It's a [p. 4] sensitive thing.

MR. DOLINKO: That's correct, there's an informal gentleman's agreement to that effect, but it is not in a strict sense a formal part of the settlement.

MR. ISHAM: A question has been raised, and that is on this client request for information, there are standard industry forms that are issued by what, American College, things like that.

MR. KOKKONEN: From a practical standpoint, the Guardian uses forms on the back of many of their factfinders –

THE COURT: Well, let's not get in discussion. I must say I was confused with what it was you agreed to or agreed not to do in request for information.

MR. NAPOLI: There's been a problem that Mr. Kokkonen writes letters and requests at times voluminous amounts of information. The policyholder is contacted and they don't even know what's going on. They just signed something that's put in front of 'em, and, basically, what we understood this agreement to be is that he no longer uses form letter requesting information, and that if a policyholder wants information, they should just do so by themselves without Mr. Kokkonen writing the letters and using his [p. 5] letterhead and things of that nature.

MR. DOLINKO: In other words –

THE COURT: That's fine with me. I just want to make sure if I don't understand it, I don't know what –

MR. ISHAM: So what is the arrangement, he can't use his letterhead?

MR. DOLINKO: Any requests or –

THE COURT: Let's be practical about this. I'm a policyholder of Mr. Kokkonen and I go in and I say, "What can I do about this," and the answer is you'll have to get the information from the Guardian. If there's a specific form to do that, he can't furnish the form to the policyholder?

MR. NAPOLI: They don't have a specific form. The form we're talking about –

THE COURT: My point is what is the policyholder to do?

MR. DOLINKO: Simply make the request on their own stationery or pick up the telephone.

THE COURT: There's no question Mr. Kokkonen can tell them write in and give these three things and talk about it.

MR. DOLINKO: That's permissible.

THE COURT: Mr. Kokkonen, I'm not trying to do [p. 6] anybody's business. I'm just trying to get this straight, and it makes sense and that you can all live with I don't see you all back here in the future.

MR. ISHAM: Amen.

MR. KOKKONEN: May I address that point, sir?

THE COURT: Well, all right.

MR. KOKKONEN: I'm also a practical person, and when I go see – if I were to come to and ask or we're doing business and we want information on your policies, it's hard for you to start composing a letter, I want this dividend option and I want this dividend option. I have standard forms that I've used for years –

THE COURT: I'm not gonna try –

MR. KOKKONEN: – try to avoid creating a problem.

THE COURT: I must try and find out what you people agreed to do.

MR. ISHAM: You can do that on plain, non Kokkonen letterhead is what you're saying.

THE COURT: What it's gonna require, as I understand it, is that you're gonna have to give your policyholder whatever information it is that you need and the policyholder asks the Guardian for it and gets it. Whether this is all, you know – best way to go [p. 7] about doing business for everybody, that's not my concern. My concern is you all understand what you've agreed to, and the reason I brought one practical matter up, I could see it was gonna be a problem if you didn't get it resolved here and now.

MR. KOKKONEN: I'm trying to avoid that problem, and, realistically, that is an extreme burden, an extreme practical burden, because when I go to a client's house, it is so much easier and faster for me to use just a white piece of paper on which I've Xeroxed certain boxes that he can check off.

MR. DOLINKO: That's exactly what we're trying to avoid the use of, because let me just explain briefly, because we get numerous of these forms in from clients of Mr. Kokkonen, and when the client is contacted, the client doesn't even know what we're talking about when our agency asks.

THE COURT: You know –

MR. DOLINKO: I know –

THE COURT: – you people do as you want. I don't think you have the case settled, and we'll just have to present it to the jury. I have to tell you –

MR. ISHAM: I was hoping we did, quite honestly, because we've come a long way to this stage.

THE COURT: I understand that, but it seems to [p. 8] me that somewhere along the line the policyholder is being left out in the cold as to who properly wants to get something done, wants to get it done.

MR. NAPOLI: We agree, your Honor, and we've always given the information to the policyholder. The problem we're trying to resolve through a settlement is that sometimes the information requested is eight cartons of things.

THE COURT: If you don't settle this aspect of it here, it's gonna be settled some other way. You're all gonna walk away from here.

MR. ISHAM: This is our best chance.

THE COURT: Seems to me there's gotta be an easy way of assuming that the policyholder truly wants something, they can know what it is they want and be able to get it.

MR. DOLINKO: What if we agree that any requests for information will be submitted from the policyholder only to the Guardian in good faith?

MR. ISHAM: That's fine.

MR. KOKKONEN: In good faith – yeah, good.

MR. DOLINKO: Just simply that agreement. Is that okay, that any submission of information will be in good faith – I'm sorry, any request for information will be submitted by the policyholder in good faith.

[p. 9] If it's so advised by Mr. Kokkonen, in other words, Mr. Kokkonen will be acting – agreed he will act on good faith.

MR. ISHAM: All parties, the good faith standard, the request and fulfilling.

THE COURT: I don't want to see you people come back here to have the agreement enforced. I don't want to see anybody fooling around, that's all I can say.

MR. DOLINKO: Is that acceptable?

THE COURT: You all have better things to do than worry about coming back here.

MR. NAPOLI: Is that acceptable?

MR. KOKKONEN: If I understand what it was – maybe it could be read back to me, the last statement.

MR. ISHAM: My impression is that this part of the agreement is of concern to the Guardian because they feel that you can become abusive in your requesting of information; is that right?

MR. NAPOLI: That's correct.

MR. DOLINKO: Right.

MR. ISHAM: Regardless of whether there's merit to that position, that's their concern. The way to solve the problem is to import the good faith requirement

on the requests. That would allow you to use your existing forms, as long as they're submitted [p. 10] in good faith.

THE COURT: And if the submission is actually by the policyholder, as I understand it.

MR. DOLINKO: That is correct.

MR. KOKKONEN: I don't understand that. I don't understand what you're saying by that.

MR. NAPOLI: You can't write the letter yourself. The policyholder can pick up the phone and the policyholder can write the letter, and if you're advising the policyholder and you're requesting the information, it has to be a good faith reason for the request.

MR. DOLINKO: That's all.

MR. ISHAM: But he can use his existing forms to check a box.

MR. NAPOLI: Not that form letter.

MR. KOKKONEN: If a policyholder signs the form, then he has authorized the –

THE COURT: All you people are doing is building a new lawsuit. Let's let the jury decide this one. You know, this –

MR. KOKKONEN: I'm certainly trying to avoid it, and I don't understand the problem, why you're throwing that issue at all into it. I didn't know that it was even a bone of contention on that matter.

[p. 11] MR. DOLINKO: Can't we simply agree that, Mr. Kokkonen, you will act in good faith in advising

a policyholder to request information from the Guardian? Is that fair?

MR. ISHAM: Yes, we can agree to that.

MR. DOLINKO: That's it.

MR. ISHAM: I mean if we can't, then you've lost your lawyer.

THE COURT: If you can't, there's something fishy somewhere.

MR. DOLINKO: The request comes from a policyholder, we've agreed on that, and Mr. Kokkonen suggests that the policyholder makes a request of the Guardian, that suggestion will be made and only in good faith. That's all.

MR. KOKKONEN: You're saying I cannot request any information from the Guardian? That seems strange.

THE COURT: Mr. Kokkonen, it's quite obvious the case is not gonna get settled.

MR. ISHAM: You want to –

MR. KOKKONEN: Yes, I do.

MR. ISHAM: – work our way through all these things.

THE COURT: If you – if a policyholder's information is going to be requested, it's going to be [p. 12] requested by the policyholder. If you're giving advice to the policyholder, it'll be done in good faith, and that's it. If it's hard to understand –

MR. KOKKONEN: That's a good statement, sir. I can accept that.

MR. ISHAM: Okay. Then the only other point that is not a big point is when does this turnover of the last remaining so many files physically in the trunk of the car out here get turned over?

MR. DOLINKO: By March 31, 1992.

MR. ISHAM: Fair enough. And to where, San Luis Obispo office?

MR. DOLINKO: Yes, at a time to be mutually agreed upon between you, Mr. Isham, and I, or Mr. Napoli.

MR. NAPOLI: And it's understood – just wanted to add that the information will be –

MR. KOKKONEN: Don't add any more.

MR. NAPOLI: The information will be sent to the policyholder directly.

MR. DOLINKO: That's been established.

MR. ISHAM: We have an agreement.

THE COURT: Okay.

MR. ISHAM: Thanks –

MR. NAPOLI: Judge, do you understand the [p. 13] agreement? I just wanted to have one party not involved in this making sure that the judge understood the agreement.

THE COURT: Oh, I understand.

MR. DOLINKO: Thank you, your Honor. We appreciate it.

THE COURT: We will go out and let the jury know their work is over. Do you wish to all be in the courtroom when the announcement is made to the court, or would you rather –

MR. DOLINKO: Hide.

MR. ISHAM: Do you think they'll throw something?

MR. DOLINKO: Your Honor, would it be appropriate for us to ask the jurors what they think afterwards?

THE COURT: I don't have any problem. I will tell them that the admonition is lifted, they can speak to whoever they wish, but the choice is theirs, so I don't – there might be certain cases I wouldn't allow that to happen.

MR. DOLINKO: Thank you, your Honor.

THE COURT: None of you may want to know.

(Whereupon, the in chambers proceedings were concluded, and proceedings were held in open court.)

[p. 14]

STATE OF CALIFORNIA)
) SS.
COUNTY OF TULARE)

I, TRACI A. ROLDAN, Certified Shorthand Reporter, DO HEREBY CERTIFY:

That I was present at the time of the Proceedings in the case as entitled on the title page thereof; that I took down in shorthand all of the testimony given and proceedings had. I further certify that the foregoing and annexed pages numbered 1 to 13, both inclusive, comprise a full, true and correct transcript of my shorthand notes reduced by computer under my supervision.

Dated: April 5, 1992, at Visalia, California.

/s/ Traci A. Roldan
TRACI A. ROLDAN,
CSR# 7566